

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARYANN P. DeGUZMAN and U.S. POSTAL SERVICE,
POST OFFICE, Petaluma, CA

*Docket No. 99-2319; Submitted on the Record;
Issued October 13, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the case is not in posture for decision regarding whether the Office abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision¹ on September 13, 1996 in which it affirmed the October 15, 1993 and May 4, 1994 decisions of the Office, on the grounds that appellant did not meet her burden of proof to establish that she sustained a back injury in the performance of duty. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.²

On June 4, 1998 appellant requested reconsideration of her claim. She sent a facsimile copy of a document dated June 4, 1998, in which she presented arguments in support of her reconsideration request.³ By decision dated July 8, 1998, the Office denied appellant's

¹ Docket No. 94-2454.

² Appellant filed a petition for reconsideration of the Board's September 13, 1996 decision and, on June 4, 1997, the Board issued an order denying appellant's petition for reconsideration, the Board's order is not in the record, but it is referenced in other documents and recorded on at the Board

³ The facsimile copy contained complete pages numbered one, three, five and six; the copy contained an incomplete page numbered two and did not contain a page numbered four.

reconsideration request on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ the Office's regulations provide that a claimant must (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁷ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁸

The Office determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁷ The last merit decision in this case was the Board's *de novo* review of the case, issued on September 13, 1996.

In its July 8, 1998 letter, the Office improperly assumed that the Board's June 4, 1997 order, which denied appellant's petition for reconsideration before the Board, constitutes the last merit decision in this case. While an appellant is allowed an opportunity by regulation to petition the Board for reconsideration,⁹ such petition for reconsideration, unless granted by the Board, does not constitute a merit review of the case. In addressing the finality of the Board's decisions, the applicable regulation provides: "The decision of the Board shall be final upon the expiration of 30 days from the date of the filing of the order, unless the Board shall in its order fix a different period of time or reconsideration by the Board is granted."¹⁰ The Board's decision becomes final unless the Board grants a petition for reconsideration and reopens the case. The Board has previously concluded that an order by the Board merely denying a petition for

⁴ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁹ 20 C.F.R. § 501.7.

¹⁰ 20 C.F.R. § 501.6.

reconsideration, which does not grant reopening of the case, does not constitute a merit decision.¹¹

The Board finds that the filing of appellant's June 4, 1998 reconsideration request was untimely. For the reasons detailed above, the last merit decision in this case was issued on September 13, 1996. Appellant filed her reconsideration request on June 4, 1998, more than one year after September 13, 1996.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."¹² Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹⁴ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁸

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of

¹¹ See *Veletta C. Coleman*, Docket No. 95-431 (issued February 27, 1997).

¹² *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). The Office therein states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence, which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report, which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

¹⁴ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁵ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁶ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁷ See *Leona N. Travis*, *supra* note 15.

¹⁸ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

the claimant and raise a substantial question as to the correctness of the Office decision.¹⁹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.²⁰

In its July 8, 1998 decision, the Office stated that it had reviewed the incomplete document appellant sent to it on June 4, 1998, but found that it did not clearly show that the Office's prior decision was in error. The Office further noted that it had received a facsimile on June 9, 1998 in which appellant acknowledged problems in transmitting the June 4, 1998 facsimile and indicated that she would submit another document. The Office indicated, however, that it did not receive any further documents from appellant.

The Board finds, however, that the Office did not consider all the relevant evidence of record prior to denying appellant's reconsideration request. On June 23, 1998, prior to the issuance of the Office's July 8, 1998 decision, appellant sent a facsimile copy of a 13-page document to the Office. The document contained additional argument in support of appellant's reconsideration request, which had not been contained in the document received on June 4, 1998.

The Act provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim.²¹ Since the Board's jurisdiction of a case is limited to reviewing that evidence which is before the Office at the time of its decision,²² it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its decision. It is crucial that all evidence properly submitted to the Office prior to the time of issuance of its decision be addressed by the Office.²³

In the present case, the Office did not review evidence received prior to the issuance of its July 8, 1998 decision, *i.e.*, the 13-page document submitted to the Office on June 23, 1998. The Board, therefore, must set aside the Office decision dated July 8, 1998 and remand the case so that the Office may fully consider the evidence appellant submitted with her untimely reconsideration request prior to the issuance of this decision. Following such further consideration and development as it deems necessary, the Office shall issue an appropriate decision regarding appellant's reconsideration request.

The decision of the Office of Workers' Compensation Programs dated July 8, 1998 is set aside, and the case is remanded to the Office for further proceedings consistent with this decision of the Board.

¹⁹ *Leon D. Faidley, Jr.*, *supra* note 8.

²⁰ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

²¹ 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.130.

²² *See* 20 C.F.R. § 501.2(c).

²³ *See William A. Couch*, 41 ECAB 548, 553 (1990).

Dated, Washington, DC
October 13, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member